No. 154.

Brief of Smith for D. E.

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IN THE SUPREME COURT OF THE UNITED STATES.

QUINCY A. SHAW,
Plaintiff in Error,
vs.
MURRAY M. KELLOGG,
Defendant in Error.

No. 154.
(16252)

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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This case having been decided in the trial Court (the Circuit Court of the United States for the District of Colorado) upon a motion for an instruction for a verdict for the defendant, upon the plaintiff's evidence, there can be no controversy about the facts in the case. The statement contained in the brief of plaintiff in error is quite full, and sets out substantially all the record evidence. (Printed record, pages 1–16.) And we therefore content ourselves with a brief summary of the

facts in a more connected form, as a basis for our discussion of the law of this case.

After the passage of the Act of June 21, 1860, in favor of the Baca heirs, nothing further was done in the interest of the grantees until February 9, 1863, when John S. Watts, as the attorney for the heirs of Luis Maria Baca, filed in the office of the Surveyor General of New Mexico a letter dated December 12, 1862, stating that as such attorney he had "this day selected as one of the five locations belonging to the said heirs under the sixth section of the Act of Congress, approved June 21, 1860, a tract of land in the Territory of New Mexico, described as follows:

"Beginning at a point on the eastern edge of the Valley of San Luis, where the thirty-eighth parallel of north latitude crosses the base of the snowy range dividing the waters of the rivers Arkansas and Del Norte, thence east along said parallel four and one-half miles, thence south along a meridian line twelve miles, thirty-six chains and forty-four links distance; thence west at a right angle twelve miles, thirty-six chains and forty-four links distance; thence north to the said specified parallel; thence east with said parallel to the place of beginning.

"I further state that the said land is entirely vacant, not claimed by any one, is not mineral, but located for purposes of arable and pastoral agriculture, and is within the Territory of New Mexico as established in the organic act. I hereby accord-

ingly make application for the survey and location of the tract of land in accordance with the provisions of the above Act of Congress.

"JOHN S. WATTS,
"*Attorney for Heirs of Luis Maria Baca.*"

Printed record, pp. 3 and 4.

By the express provision of the Act of June 21, 1860, the right thereby granted to the said heirs of Baca was to continue in force during three years from the passage of the said Act, and no longer (record, page 2), and it is conceded that the letter of December 12, 1862, was the only act or thing done by the heirs of Baca, or in their interest prior to June 21, 1863, when their right of selection expired. On February 24, 1863, the Territory of Colorado having in the meantime been organized and including within its boundaries the lands in controversy, and a Surveyor General having been appointed for the Territories of Colorado and Utah, the Surveyor General of New Mexico transmitted to the Surveyor General of Colorado a copy of the foregoing application of Watts, as the attorney for the heirs of Luis Maria Baca, and thereupon the Surveyor General of Colorado, on February 24, 1863, reported to the Commissioner of the General Land Office the fact of his having received a copy of such application, and added this significant statement: "I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca 'floats' and

should locate it as this is located, *for the reason that, in his opinion, it would cover rich minerals in the mountains.*" (Rec., p. 4.) The receipt of this communication was acknowledged by the acting Commissioner, on March 13, 1863, in a letter addressed to the Surveyor General of Colorado and Utah, in which, among other things, the statement of Governor Gilpin was referred to as being important, and the necessity of proof of the non-mineral character of the land being had before the application could be approved, was emphasized as follows:

"It is necessary, before the application can be approved by this office, that it be accompanied by the certificates of the Surveyor General and the Register and Receiver that the land selected *is vacant and not mineral.* This is in accordance with our instructions to the Surveyor General of New Mexico, extracts from which were furnished your office in our communication of June 7, 1862. Especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Governor Gilpin, which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you to do so, you will transmit to this office your official certificate setting forth these facts."

"You will also correspond with the Register and Receiver of Colorado when they enter upon their official duties, communicating to them the

substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that your own is to be furnished under, which, when received, you will forward to this office.

"Very respectfully, your ob't serv't,

"JOSEPH S. WILSON,

"*Acting Commissioner.*"

Printed record p. 5.

On October 13, 1863, John Pierce, Surveyor General of Colorado, who had, in the meantime, succeeded F. M. Case, advised the Commissioner of the General Land Office that application had been made to him by Governor Gilpin for a survey of the grant, and stating that Mr. Gilpin was desirous of taking immediate possession and improving the said grant, and that to do so, it would be necessary to have the survey made during the ensuing six weeks, and that while, in his opinion, he had no authority to order the survey and make a contract therefor, he had done so, subject to the approval of the General Land Office, Mr. Gilpin having secured him as to the expenses, by the deposit of money to cover the costs thereof, but that, if disapproved, the survey would be considered as a private one and not official. (Printed record, page 6.)

Under this arrangement, the Sheldon survey was made, it having been commenced upon October 22d and concluded November 4, 1863. Under

date of November 2, 1863, the Commissioner of the General Land Office returned the contract with the Deputy Surveyor, Mr. Sheldon, without approval, and called attention to his former letter of March 13, 1863, and to his explicit instructions with respect to ascertaining the character of this location as to minerals. (Printed record, page 6.) On December 12, 1863, the Surveyor General of Colorado acknowledged the receipt of the letter of November 2d, disapproving of the contract for the survey of Baca Grant No. 4, and transmitted therewith his certificate that the land was not mineral and vacant, and proceeded to give his reasons for making such certificate. (Record, pages 7 and 8.) In the printed record (page 10), there is printed, together with the certificate of the Surveyor General to the non-mineral character of the land, a certificate in the same form, signed by the Register and Receiver of the Land Office, for the District of Colorado, under the same date, December 5, 1863, as the certificate of the Surveyor General. This latter certificate, however, would seem to have been procured by Governor Gilpin, and *not furnished to the Surveyor General, or filed in his office*, because it does not appear in the case until the 26th day of February, 1864, upon which date the Commissioner notified the Surveyor General of Colorado that among the papers deposited in his office by Mr. Gilpin was a certificate of the Register and Receiver at Golden City, Colo., that

the lands covered by the Baca Grant No. 4 were not mineral. (Printed record, page 10.) On January 16, 1864, the Commissioner of the General Land Office acknowledged the receipt of the letter of the Surveyor General of 14th of December (12th) with the enclosed certificate, relating to the fourth location of the Baca heirs, suspending the approval of the selection, the letter being as follows:

"*GENERAL LAND OFFICE.*

"JANUARY 16, 1864.

"*John Pierce, Esq., Surveyor General, Denver City, C. T.*

"SIR: Your letter of the 14th December last, with inclosed certificate relating to the 4th location of the Baca heirs, is received. The Act of 21st June, 1860, confirming the claim of Luis Maria Baca, authorized the heirs of said Baca to select, in lieu of the tract claimed by the town of Las Vegas, an equal quantity of *vacant* land *not mineral*. With a view to carry out the requirements of the law, the Surveyor General of Colorado was required, in our instructions of June 7, 1862, to accompany the final rendition of the certificate with his own statement, and also that of the Register and Receiver setting forth the fact that the land selected is vacant and not mineral. Those instructions were reiterated in our letter of March 13, 1863.

"The evidence furnished by you is not sufficient, in the opinion of this office, to prove that the selection No. 4 does not cover valuable mineral

deposits. Your certificate is not based upon actual knowledge of the facts, but upon the information and conclusions deduced from reasoning. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of ex-Governor Gilpin, officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality.

"The statement of the Register and Receiver, required in our instructions, is also wanting.

"The approval of the selection will stand suspended until some satisfactory proof is obtained upon the points indicated.

"Very respectfully, your obedient servant,

"J. M. EDMUNDS,

"*Commissioner.*"

Printed record, p. 8.

On February 12, 1864, the Commissioner of the General Land Office sent to the Surveyor General of Colorado the latest instructions, which the record in this case shows to have been made by the Land Office, or received by the Surveyor General, prior to the approval of the survey and plat by the Surveyor General of Colorado, and to this letter we especially call the attention of the Court. It is found in full on pages 9 and 10 of the printed record. The proceedings of the Surveyor General with respect to said survey, prior to that date, are pronounced irregular, and express directions are given with respect to the approval of the said survey and plat, in the following language:

"The original field notes, duly verified and authenticated, must be filed in the Surveyor General's Office of Colorado. Upon bringing these to the usual satisfactory tests, and finding the same all regular and correct, you are authorized, in virtue of the aforesaid 6th section of the said Act of 21st June, 1860, to approve the said survey, but *in your certificate of approval you will add the specific reservation stipulated by the statute—but not to embrace mineral land*, nor to interfere with any other vested rights, if such exist.

"The statute does not order the issue of a patent. The aforesaid law of 21st June, 1860, with your plat approved in the manner indicated, will therefore constitute the evidence of title.

"You will take care so to arrange the matter, that hereafter, when, in the gradual progress of the lines of the public surveys, they shall reach the Baca location, they shall be properly connected therewith and so appear on the township plats.

"Very respectfully, your obedient servant,

"J. M. EDMUNDS,

"*Commissioner.*"

Printed record, pp. 9 and 10.

The only other letter bearing upon the matter is the one of February 26, 1864, already mentioned, which returned to the Surveyor General of Colorado certain papers deposited in the Land Office at Washington, by Mr. Gilpin, and which were, in the language of the Commissioner, "transmitted for such action as you shall deem proper in the premises, in accordance with the views expressed

in our communication to you, dated the 12th inst." Immediately upon the receipt of these last mentioned papers from the Commissioner, the Surveyor General of Colorado approved the field notes of the survey on March 15, 1864, and upon March 18, 1864, he approved the plat in the following language:

"The above map of the boundary lines of grant No. 4 of the heirs of Luis Maria Baca, in San Luis valley, Colorado Territory, as surveyed by Albinus Z. Sheldon, under his contract bearing date the 7th day of October, 1863, is strictly conformable to the field notes on file in this office, which have been examined aud approved, *subject to the conditions and provisions of Section 6 of the Act of Congress approved June 21, 1860.*

"JOHN PIERCE,

"*Surveyor General, Colorado and Utah.*

"*Surveyor General's Office, Denver, March 18, 1864.*"

Printed record, p. 11.

The transcript of the field notes thus approved and the plat of the survey thus approved were, on March 29, 1864, transmitted to the Commissioner of the General Land Office, and the receipt of the same was acknowledged on May 4, 1864, as follows:

"*GENERAL LAND OFFICE.*

"May 4, 1864.

"*John Pierce, Esq., Surveyor General, Denver City, C. T.*

"SIR: Your letter of March 29th last, transmitting transcript and field notes of the survey of

grant No. 4 of the heirs of Luis Maria Baca, has been received at this office.

"Very respectfully, your obedient servant,

"J. M. EDMUNDS,

"*Commissioner.*"

Printed record, p. 11.

The record, therefore, seems to justify the following propositions:

At the time of plaintiff's grant (Act of Congress, June 21, 1860; printed record, page 2) there was no law or method by which any citizen could obtain title to mineral land of the United States, and to put it beyond question, the Act under which plaintiff claims expressly reserved mineral land from location.

Gov. Gilpin bought the right to locate this grant before it was located, and had it located and surveyed under his personal supervision, and with the expressed intention of making it "cover rich minerals in the mountains" (printed record, pages 5-7), and title remained in him until 1885—nine years after the location of the Eastern Star Mine.

Hon. J. M. Edmunds, Commissioner of the General Land Office having been notified by Surveyor General Case of such intention, took every precaution to see that this grant as located should not take mineral land.

The Eastern Star Mine was located in April, 1876 (printed record, page 2), and has been continuously in the possession of defendant in error

and his grantors since that date, which was nearly three years prior to the letter of Commissioner Williamson, from which so much is claimed by plaintiff in error.

Nearly three years after the location of the Eastern Star Mine, Gov. Gilpin applied for a patent, which was refused, and no patent has ever issued.

There is now no question as to the land being mineral land. The pleadings admit it, and the Court below so certifies it. (Printed record, page 2.)

The approval of the plat and survey by the Surveyor General contained, by the express order and direction of the Commissioner of the General Land Office, the special reservation stipulated by the statute, that the location should not embrace mineral land (printed record, page 10), and this status remained unchallenged and unchanged until nearly three years after the location of the Eastern Star Mine, and until the writing of the letter of Commissioner Williamson.

The contention of defendant in error upon the foregoing state of facts is that the character and extent of the title to the land in controversy which passed to the heirs of Luis Maria Baca and their grantees by the Act of Congress is defined and limited by the force and effect of the official acts of the Land Department of the United States prior to May 4, 1864, while the plaintiff in error relies

very largely upon certain further letters and so-called decisions of the Land Department of the United States, written and made long after the approval of the survey and plat by the Surveyor General of Colorado, and its receipt as thus approved by the Commissioner of the General Land Office. These subsequent acts are fully set forth in the record (pages 12–15) and in plaintiff's brief, (pages 12–18.)

In paragraph 15 of counsel's brief, page 13, we come to the letter of Commissioner Williamson of March 21, 1879, written fifteen years after the approval of the plat and survey, and there, *for the first time*, is found an official statement that the question as to the mineral or non-mineral character of said land has been passed upon by competent authority. The letter is given in full on pages 13, 14 and 15 of counsel's brief, and on pages 12, 13 and 14 of the printed record, and would seem to have been written in response to an application by ex-Governor Gilpin for a patent to the land. We will here say that our position with respect to it is that it was not a decision upon any application in which the mineral or non-mineral character of the land was to be determined, or in which there was any hearing with respect thereto, or with respect to the rights of third parties, and was wholly *ex parte*, and that, giving to it its utmost effect, it is merely a recital of the opinion of Commissioner Williamson as to the legal effect of what had hap-

pened fifteen years before, and, above all, that the letter itself shows that his opinion was *based upon a direct and obvious mistake of fact* in saying that the question as to the mineral or non-mineral character of this land had been passed upon by competent authority, because the record of the case shows beyond a question that, up to and at the time of the approval of the plat and survey by the Surveyor General of Colorado, the question as to whether the land was mineral or not mineral *had not been passed upon*, but, on the contrary, under the specific and direct instructions of the Commissioner of the General Land Office, had been expressly reserved in the approved plat and survey, the only evidence of title which, under the laws as they then existed, could be given to the owners of the grant. The further letters contained in counsel's brief from succeeding Commissioners of the General Land Office add nothing to the letter of Commissioner Williamson, because, in each instance, they expressly follow and adopt the conclusions and statements of that letter, and it is worthy of note that, at the time when Commissioner Williamson wrote his letter of March 21, 1879, the defendants in error and their grantors had been, for upwards of three years, in the actual possession of the land in controversy as a mining claim, the claim having been originally located in 1876. (Printed record, page 2.)

Counsel for plaintiff in error rely upon three

propositions, which, for convenience, we here restate:

"1. As early as May 4, 1864, the title of the government was divested, and that of the heirs of Baca fully perfected as to that tract of land designated as Baca Grant No. 4, and the rights of the plaintiff are the same as if government patent had then been issued for said lands.

"2. The proper officers of the government, after investigation of the facts, determined, in 1864, that the land in controversy was not mineral. That determination is conclusive against all subsequent claimants.

"3. No subsequent discovery of mineral could divest the title derived through the grant made by Congress to the heirs of Baca, or except therefrom any portion of the surveyed premises."

And taking them in their order, we submit the following with respect thereto:

The first proposition states only part of the truth, as we contend. The essential omission is the entire failure to recognize that both by the Act of Congress and by every act of the officers of the Land Department, prior to May 4, 1864, and including the final approval of the plat and survey, distinct reservation was made of mineral land, so that if counsel's first proposition was amended by substituting for the words "government patent" the words "an approved location with a reservation of mineral land," it would fairly state both the law and the facts. In truth, that

is our whole contention. The plat and survey operate only to segregate the land and fix and define its location, and *if there had been no reservation in the Act*, the plat and survey would have completed in the grantees a perfect title to the land and everything contained in it, but Congress saw fit to place in the grant a reservation of mineral land, and the only method by which that reservation could be eliminated from the grant, and mineral lands, in fact, made to pass thereunder to grantees, if at all, would be by an express determination and decision by officers of the government, vested with authority to make such decision, that the land in question was non-mineral land, and the approval of a plat and survey following, and based upon such a decision. In this case, it is plain that no such decision was ever made. We have here the Land Department notified in advance of an intention to defraud the government by the location of a grant so that it would cover rich minerals in the mountains, and it will be noticed that the statement of ex-Governor Gilpin to Surveyor General Case of such intention was made before the appointment of Mr. Case to the office of Surveyor General; and that he, as an honest man, felt bound to communicate to the government which he represented his personal knowledge of this fraudulent intention on the part of the claimants, and the official acts of the department at Washington show that, until the final approval of the survey, with the

distinct reservation that it should not embrace mineral land, the department was at all times vigilant to prevent the passing of title to any mineral land under this attempted location. The brief official life of Mr. Case as Surveyor General may be another illustration of the folly of telling all one knows—especially about the Governor's intentions.

In a certain sense, the real question at issue between the parties was not passed on by the trial Court, as the Court did not find it necessary to determine the question of the authority of the officers of the Land Department to extend the grant by implication. The plaintiffs contend that although, by the Act of Congress, mineral land was forbidden to them, still, by the acts of the officers of the government, it had been determined that the land which they located was not mineral, and that such decision was final and conclusive upon every one. The defendant denied, first, that the officers had ever decided the land to be non-mineral, and, second, denied their power to so decide by implication only, but the Court very properly stopped at the first question presented, and finding, as a fact, that the Land Office had never decided the land to be non-mineral, and that it had carried the reservations of the Act into the approval of the survey and plat, determined the case upon that issue of fact and not upon the question of authority or want of authority under the law to enlarge the grant by a specific finding as to the mineral character of the

land. *The Act of Congress and the approved plat and survey constituted the sole muniments of title of the plaintiff, and in both the reservation is expressed.* The effect of this condition of the title (having a reservation) is stated by the Supreme Court of the United States in Barden vs. The Northern Pacific R. R. Co., 154 U. S., 288, a case in which the granting language of the Act is precisely the same as in this case, and the land described in precisely the same words, "*land not mineral.*"

The Act of Congress granting lands to The Northern Pacific Railroad Company was approved July 2, 1864. (13 Statutes, Chapter 217, page 365.)

The language of the third section is: "That there be, and hereby is, granted to The Northern Pacific Railroad Company, its successors and assigns, * * * every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railway line. * * *"

The grant thus made was accompanied by certain provisos or conditions, among them this: "That all mineral lands be, and the same are hereby excluded from the operations of this Act, and, in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road may be selected as above provided, and that the word 'mineral,' when it occurs in this Act, shall not be held to include iron or coal."

Provision was made in the Act for the filing of lists and plats of survey, and for the issuance from time to time, as the road was completed and certified, of patents from the United States. (Section 4 of said Act, 13 Statutes, Chapter 217, page 365.)

Without attempting to state at length the facts in the Barden case because it is fully done in the opinion from which we quote, we call the attention of this Court first to the rule of law declared by this Court with respect to the condition of the title under such a grant, in view of the reservation therein contained, when no patent had issued.

"And what was that title? It was of the lands which, at the time of the grant, were not reserved as minerals, and of the lands which, at the time of the location, had not been sold, reserved or to which a pre-emption or homestead right had not attached. If one were to sell land, reserving therefrom the minerals of gold or silver found therein, and tell the purchaser to take the surveyor and measure off the land, would it be urged or pretended that the moment the surveyor ascertained the boundaries of the land sold, the reservation of the minerals then undiscovered would be eliminated? Would anyone uphold the reasoning or the doctrine which would assert such a conclusion? And can any one see the difference between the case now before us and the case supposed? Not a word was said or suggested in the cases cited about the elimination of the reservation for that

cause, and not only in the cases cited by the plaintiff, but, in a multitude of other cases, almost without number, a like silence was observed. In none of them was it ever pretended that the ascertainment of the location of the lands granted operated to withdraw from the grant the reservation of the minerals then disclosed. *The grant did not exist without the exception of minerals therefrom*, and Congress has declared, in positive terms, that the Act shall not be construed to embrace them, and there is nothing in any of the cases cited in plaintiff's contention which indicates in the slightest degree that the original exception was subsequently qualified.

"It seems to us, as plain as language can make it, that the intention of Congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral. After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and, among other things, that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not reserved, sold, granted or otherwise appropriated, and were free from pre-emption and other claims or rights at the time the line of the road was definitely fixed, and was coupled with the condition that all mineral lands were excluded from its operation, and that, in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands, in odd sec-

tions, nearest to the line of the road might be selected.

"There is, in our judgment, a fundamental mistake made by the plaintiff in the consideration of the grant. *Mineral lands were not conveyed, but by the grant itself and the subsequent resolution of Congress cited, were specifically reserved to the United States, and excepted from the operations of the grant. Therefore, they were not to be located at all, and if, in fact, located, they could not pass under the grant.* Mineral lands being absolutely reserved from the inception of the grant, Congress further provided that at the time of the location of the road other lands should be excepted, viz., those previously sold, reserved or to which a homestead or pre-emption right had attached."

Barden vs. Northern Pac. R. Co. 154 U. S., 288, 315, 316.

It is conceded that there was no authority at law for the issuance of a patent, conveying the lands by metes and bounds. Had there been, and the plaintiffs had received a patent in the usual form, without reservations, it would, under well settled rules, have carried all the title to all the land, including mineral, and would in itself have been a conclusive adjudication by the department that the land was not mineral.

"It is true that the patent has been issued in many cases without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly, by

officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government, until, by further legislation, a stricter regard to their duties in that respect can be enforced upon them. The fact remains that, under the law, the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the Land Department. Until such patent is issued defining the character of the land granted, and showing that it is non-mineral, it will not comply with the Act of Congress in which the grant before us was made to plaintiff. *The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands,* but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and, as we have already said, in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title." (Barden vs. Northern Pac. R. Co., 154 U. S., 288–317.)

In the case at bar, by the force of the law, the plaintiffs were compelled to accept as their sole title the Act of Congress and the approved survey under it, in which respect this case differs from

many decided cases on similar subjects, and throughout that title the reservation of the Act was carried to the end.

In the first instance, the question of the mineral character of the land would seem to have been committed to the Surveyor General of Colorado, for his investigation and report—not for his final decision. Such is the language of the instructions of the Commissioner of the General Land Office, both to the Surveyor General of New Mexico and Colorado (pages 5–8), the language being that "*it is necessary, before the application can be approved* by this office, that it be accompanied by the certificates of the Surveyor General and the Register and Receiver, that the land selected is vacant and not mineral." These required certificates of the Surveyor General of Colorado and the Register and Receiver would seem to have been made on December 5, 1863. That of the Surveyor General was forwarded to the department at Washington, and was by the Commissioner *distinctly disapproved and returned.* (Printed record, page 8.) The other certificate—that of the Register and Receiver—so far as this record shows, never found any official lodgment in the records of the government, and, in fact, was not brought to the notice of the Surveyor General until *after he had approved the plat and survey*, being received by him fourteen days after such approval, and on March 29, 1864. (Printed record, page 11.) This record, now presented and relied

upon as title, shows no certificate from the Surveyor General of Colorado which has ever at any time received the approval of the Commissioner of the General Land Office. It is not true, as claimed by counsel, that the Surveyor General "located" this land, and that he could only have done so upon ascertaining that it was vacant land, not mineral, and within the territorial limits fixed by the granting Act. The proceedings had in the office of the Surveyor General of Colorado were, confessedly, outside of the law, were irregular, and were so declared by the Commissioner of the General Land Office, and the contract for the survey was expressly disapproved and the survey declared not to be an official one. (Printed record, page 9.) To save to the parties the expense of the survey, and to utilize it as a basis for action by the department, the Surveyor General was authorized to approve the said survey, irregular and without authority of law as it had been, upon certain prescribed and expressed conditions, chief of which was that in the certificate of approval of such survey there should be added the "special reservation stipulated by the statute—'but not to embrace mineral land.'" So that we have in this case, resting in the Surveyor General, a special and well defined authority coming from his superior officer, beyond which he could not go, and did not go, and there was not only no decision that this was non-mineral land, but, on the contrary, the rights of the

government in the lands included in the survey, as approved, were expressly reserved, should the survey as approved be found to contain mineral land. No other effect can be given to this reservation. If the approval of this survey, with this reservation of mineral land in it, means that by such approval all the land passed, whether it was mineral or not, then the exception is an idle phrase, without force or meaning. If, on the contrary, it means what it says, Gov. Gilpin took his title at his peril, knowing that in no event could such title embrace mineral land. Counsel call attention to the case of Rutherford vs. Greene's Heirs, 2 Wheat., 197, where it is held that the granting statute vested the title in Gen. Greene, and "that the survey made in pursuance of the Act gave precision to that title and attached it to the land surveyed." In that case there was no question of reservation, or quality, or character of the land. The Act making the grant in that case, as in this, was a grant *in praesenti* and only required the identification and segregation of the land to vest the title, but the vital difference is that in this case the grant was not applicable to all public lands, and could not be located upon mineral land.

It has always been the policy of the government to reserve mineral lands, and this Court has declared that mineral lands have been at all times, by the settled policy of the general government,

excluded from grants, and has made that policy a controlling feature in their construction.

Prior to 1866, there was no method under the law by which mineral lands could be conveyed by the general government other than by an Act of Congress

It had been a well known policy of the government of the United States, from the time of its foundation, to reserve from sale all lands containing minerals, or "known mines." This policy was not in any degree disturbed until the passage of the Act of 1866, known as the First Congressional Mining Act. (14 U. S. Stats., 251.) In 1850, the policy of the nation's selling the mines for the purpose of obtaining public revenue began to be discussed in the National Legislature. But, after much controversy, the arguments in favor of leaving the mines free and open for exploration and development prevailed, and adverse measures were defeated or abandoned. From that time until 1866, non-action was the policy of the government. Since July, 1866, all valuable mineral deposits in lands belonging to the United States have been free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase.

Rev. Stats., Sec. 2319.

"Very soon after the conquest of California and its cession to the United States by Mexico, it was found to be rich in the precious metals, and

such was the rapid influx of immigrants from the Eastern States that the California population at the time it was organized as a State in 1850 was largely composed of mining camps and settlements engaged in mining these metals. As nearly all those mines were discovered on land the title of which was vested by the treaty in the government of the United States, it became important to determine what course the government would take with regard to this new source of untold wealth. The Spanish government, to which this territory and much other, rich in precious metals, had once belonged, had instituted a system of laws concerning her mines by which private enterprise was invited to develop them, and a revenue secured at the same time to the crown, which made Spain for the time the richest of the civilized governments of the world. This system Mexico had inherited and perpetuated, and there were many American statesmen who believed that, with the territory, we had acquired the laws which governed the production of gold from the earth. Others believed that, whether this were so or not, it would be a wise policy for the government to secure to itself a fair proportion of the metal produced from its own ground. But, while Congress delayed and hesitated to act, the swarm of enterprising and industrious citizens filled the country, and, before a State could be organized, had become its dominating element, with wealth and numbers and claims which demanded consideration.

"Matters remained in this condition, with slight exception, until July 26, 1866, when Congress

passed a law by which title to mineral land might be acquired from the government at nominal prices, and by which the idea of a royalty on the product of the mines was forever relinquished. (14 Statutes, 251.)

"During this period, however, from 1849 to 1866, the system of the disposition of the public lands in general had to be introduced into California, and grants of land were made to the State for various purposes; also to railroad companies; and in all this the attention of Congress was necessarily turned to the distinction between mineral lands and the ordinary agricultural lands of the other Western States to which similar laws had applied. This distinction is nowhere more plainly manifested than in this Act of 1853. As we said in Sherman vs. Buick (93 U. S., 209), the main purpose of that Act was to provide for the survey and sale of the public lands and for the right of pre-emption to the settler on them, and there was embraced in this clause of pre-emption the grant of the sixteenth and thirty-sixth sections to the State for school purposes. In the very sentence which contains this grant in parentheses, and while introducing the new principle that the public lands should be subject to the right of pre-emption, whether surveyed or unsurveyed, the mineral lands are excepted, in express terms, from this right and from public sale.

"We say that this introduced a new principle in pre-emption law; for, except in a very few cases, no right of pre-emption had before existed until the lands were surveyed, so that the pre-emp-

tor could designate by the description of the congressional survey the precise land to which his pre-emption attached.

"But this right of premption on unsurveyed lands was by this statute to last but one year, and so careful was Congress to protect mineral lands from sale and pre-emption, that, as we have already shown by the proviso to Section 3 of the Act, the surveyors were forbidden to extend their surveys over them.

"The effect of this was as Congress intended it should be, that, as no surveys could be made of mineral lands until further order of Congress, there could be no sale, pre-emption, or other title acquired in mineral lands until Congress had provided by law for their disposition. The purpose of these provisions was undoubtedly to reserve these lands, so much more valuable than ordinary public lands, and the nature of which suggested a policy different from other lands in their disposal for such measures in this respect as the more matured wisdom of that body, which by the Constitution is authorized to dispose of the territory or other property of the United States, should afterwards devise.

"It is a strong corroboration of this view that Congress, in Section 12 of this same statute, giving the State seventy-two sections for a seminary of learning, declares that no mineral lands shall be taken under the grant, and makes the same reservation of its mineral lands in the grant for the erection of public buildings in the State.

"We find a similar provision in the grant to the Pacific Railroad Companies, whose road it was known would pass through some of these mineral regions. By the 4th section of the Act of 1864 (13 Statutes, 356) it is declared that neither that Act nor the Act of 1862 shall be held to include in the grant 'any government reservation of mineral lands or the improvements of any *bona fide* settler on any lands returned or denominated as mineral lands.'

"As we have already said, Congress, after keeping this matter in abeyance about sixteen years, enacted in 1866 a complete system for the sale and other regulation of its mineral lands, so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States."

Mining Co. vs. Consolidated Mining Co., 102 U. S. 167-172.

On page 39 of counsel's brief, the position is taken "that there is absolutely no law or precedent which requires an affirmative approval, by the Commissioner of the General Land Office, of either the survey or the location. The authority of the Commissioner of the General Land Office in the premises rests only on the fact that he has general supervision and control, under the statute reorganizing the General Land Office, and in matters of controversy an appeal will lie to him. He has the right to veto, we may say, the action of the

Surveyor General, but in the absence of objection from the Commissioner of the General Land Office, after facts are called to his attention, the act of the Surveyor General is final and conclusive as the Act of the government." And the case of Frasher vs. O'Connor, 115 U. S., 102, is cited in support of this proposition. If this were true, which we deny, it would still be inapplicable to the case at bar, first, because the Commissioner of the General Land Office, by his various letters and instructions to the Surveyor General, had assumed to act, and to investigate and cause to be investigated the very matter in question, to wit, the mineral character of the land; and, second, because the authority given to the Surveyor General to approve the survey was special and limited in its character, and in the making of such approval no discretion was left to the Surveyor General, but the very form of his approval with reference to this reservation was directed by his superior officer. Counsel for plaintiff in error, on page 39 of their brief, make a statement which the record does not bear out. Counsel say that after a demand by the Commissioner for more evidence than had been originally produced, *and upon the furnishing of such evidence*, the Commissioner in terms authorized the Surveyor General to approve the plat and survey. For the italicized words above there is not a scintilla of support in the record. There is no proof whatever of any kind that any further

evidence as to the mineral character of the land was furnished either to the Surveyor General or to the Commissioner of the General Land Office, and the absence of any such evidence is shown by the reservation contained in the approval, because, if such evidence had been furnished, and it had been satisfactory and conclusive, there would have been no necessity for the reservation. Upon page 57 of counsel's brief, the above statement is substantially repeated, and it there appears that the claim that such evidence was furnished is drawn "by necessary deduction" from the fact that Governor Gilpin went personally to Washington. Counsel say: "We do know that he submitted sufficient to satisfy the Commissioner that the land was non-mineral," but as to how counsel know it, we are left entirely in the dark. Certainly, the record contains no evidence of that character, nor anything whatever to show that the Commissioner was satisfied that the land was non-mineral.

II.

Counsel's second proposition is that the proper officers of the government, after investigation of the facts, determined, in 1864, that the land in controversy was not mineral. This proposition, either as a fact deducible from the evidence or as a conclusion necessarily to be drawn from the record, we entirely dispute, and insist that the officers of the government did not determine prior to May 4,

1864, or at any other time, that the land in controversy was not mineral. Counsel for plaintiff in error devote many pages of their brief (pages 41-59) to answering the question, put by themselves, as to who was the proper officer to determine the character of the land on behalf of the government, and they reach the conclusion that the Surveyor General of Colorado was such officer. The cases cited by counsel with reference to the force and effect of surveys are almost without exception with reference to surveys which were provided for under Acts of Congress, general in their application, and but rarely with reference to specific grants. They are cases in which, in the ordinary course of business, without special or limited authority, the surveys in question had been made by officers of the government, and had been filed received and acted upon in the Land Offices of the government sometimes with and sometimes without the approval of the Commissioner of the General Land Office. In no case has there been a survey, in its inception confessedly irregular and without authority of law, given force and effect as a foundation for title, by reason solely of the approval of the Surveyor General. In the case at bar, the power of the Surveyor General in the premises was expressly defined and limited by his superior officer, the Commissioner of the General Land Office, by the letter of February 12, 1864 (record, page 10), as follows:

"The difficulty, however, may be avoided by pursuing the following course: The original field notes, duly verified and authenticated, must be filed in the Surveyor General's office of Colorado. Upon bringing these to the usual satisfactory tests, and finding the same all regular and correct, *you are authorized*, in virtue of the aforesaid 6th Section of the said Act of 21st June, 1860, *to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land* nor to interfere with any other vested rights, if such exist.

* * *

"Very respectfully, your obedient servant,

"J. M. EDMUNDS,

"*Commissioner.*"

Printed record, p. 10.

On page 41 of counsel's brief, what we deem an erroneous impression as to the view of the trial Court is given. The trial Court did not instruct the jury that there must be an express declaration by some officer of the Land Department in Washington that the land was not mineral. What the Court held was that there had been no determination of any kind that the land was mineral, not attempting to define or state the character of the acts, or the language in which a finding that the land was not mineral should have been expressed. It is plain, from the record, that the trial Court afforded to the plaintiff in error the utmost latitude of proof, admitting in evidence in support of this title not

only the original record upon which it was based, but all kinds and classes of public documents, regardless of whether they were prepared and published with any reference to the matter in controversy in this case or not, and throughout it all, with the single exception of the letter of Commissioner Williamson written in 1879 and the letters thereafter written by succeeding Commissioners, and based by their terms upon that letter, there is no reference whatever to the mineral or the non-mineral character of the land. We have already dicscussed the Williamson letter, and shown, as we think, that, in so far as it assumes to state that the question of the mineral character of the land had been passed upon sixteen years before, it was a simple misstatement of fact, and, being such, the conclusions based thereon must fall with it. Counsel lay great stress upon the statutory duties of the Surveyor General and upon decisions of the Supreme Court, which, in one form or another, have recognized the force and validity of surveys approved by that officer. In the Barden case, 154 U. S., 288, already cited, a like claim of ownership was made of mineral land, because the plat of a survey, including the lands in controversy, had been filed in the local Land Office and duly approved, which survey reported such lands as agricultural and not mineral, and which stood unchallenged from 1868 until 1888, when it was claimed that certain veins and lodes of mineral had been discovered in the

lands, and the claim was made, as in this case, that the filing and acceptance of such plat and survey was a determination by the government that the land was agricultural and not mineral and was conclusive upon all parties. The Barden case upon the facts is much stronger in favor of the plaintiff than the case at bar as to the effect of the survey, because in that case there was no express reservation of the conditions of the Act, but, nevertheless, in passing upon that claim, this Court says:

"Some weight is sought to be given by counsel of the plaintiff to the allegation that the lands in controversy are included in the section which was surveyed in 1868, and a plat thereof filed by the Surveyor in the local Land Office in September of that year, from which it is asserted that the character of the land was ascertained and determined, and reported to be agricultural, and not mineral. But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the Surveyor General. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted, or make any binding report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters ontside of their other duties, or determine them, nor does their report have any binding force.

It is simply an addition made to the general information obtained from different sources on the subject. In Cole vs. Markley, 2 Dec. Dep. Int., 847-849, Mr. Teller, when Secretary of the Interior, in a communication to the Commissioner of the General Land Office, speaks at large of the public notations of Surveyors, and says: 'Public and official information was the object of these notations, with a view to preventing entry until the facts are finally determined. They should be, and they are, only *prima facie* evidence, and subject to be rebutted by satisfactory proof of the real character of the land.' The determination of the character of the land granted by Congress, in any case—whether agricultural or mineral or swamp or timber land—is placed in the officers of the Land Department, whose action is subject to the revision of the Commissioner of the General Land Office, and, on appeal from him, by the Secretary of the Interior. *Under their direction and supervision, the actual character of the land may be determined and fully established.* The effect of a patent issued by them under the authority of Congress as to such matters we shall presently consider. In the present case, the mineral character of the lands in controversy is conceded. They are alleged in the complaint to be mineral lands containing gold and silver and precious metals."

Barden vs. Northern P. R. Co., 154 U. S., 288, 320.

Counsel having established to their own satisfaction that the Surveyor General had authority

to determine the land to be non-mineral, it then becomes necessary for them to aver and prove that he did so determine. We think the record shows that this claim is without foundation. The only certificate as to the non-mineral character of the land made by the Surveyor General was distinctly disapproved by the Commissioner of the General Land Office, and the evidence upon which the certificate was made, held to be insufficient. (Printed record, page 8.) There is not the slightest proof that any further evidence was ever submitted to the Surveyor General, or the question in any form passed upon by him, and but a very brief period of time—only a few days, at the utmost—could have elapsed, considering the distance and the means of communication between Washington and Denver in those early days, between the receipt by the Surveyor General of the letter disapproving his certificate and the date of his approval of the plat and survey under the special authority conferred on him of approving it, subject to the reservation contained in the Act, "but not to embrace mineral land." When the Surveyor General endorsed his approval on the plat and survey, he had no notice or knowledge of the certificate of the Register and Receiver, as it did not reach him until two weeks after his approval was made. If inferences are to be indulged, they are all against any presumption that the Surveyor General received further evidence or made

any other decision or certificate. From the date of his first certificate in December, 1863, until his final approval of the plat on March 18, 1864, it is apparent that the lands in controversy were wholly inaccessible, by reason of the snows, to say nothing of the fact that the report of the Deputy Surveyor and the original survey itself, as approved by the Surveyor General, show that the very lands in controversy embraced within so much of the grounds as would be included within the east two and one-half miles of the north boundary and the north six and one-half miles of the east boundary of the grant were inaccessible at all times, in the opinion of the Deputy Surveyor, and if any presumption arises upon the record, it is that both the Surveyor General and the Register and Receiver were certifying to matters as to which they could in the nature of things have had no proper or sufficient knowledge. Counsel, in their brief, several times claim that further evidence was submitted, but they nowhere state what it was, or where it is to be found in the record.

III.

The third proposition of counsel is that "No subsequent discovery of mineral could divest the title derived through the grant made by Congress to the heirs of Baca, or exclude therefrom any portion of the surveyed premises." This proposition requires but little discussion. Until patent is issued, the mineral character of the lands remains

open for adjudication. Such is the direct holding of this Court in the case of Barden vs. Northern P. R. Co., 154 U. S., 288. The question whether the lands were known to be mineral at the time of the grant or not becomes wholly immaterial under that decision. For a time, a line of authorities existed in seeming contradiction to the rule there declared and the decision of Judge Sawyer in the case of Northern Pacific Railroad Company vs. Barden, 46 Federal, 592, was quite generally accepted as conclusive of the determination that only such mineral lands were excepted from a grant of lands "not mineral" as were "known" to be mineral lands at the time of the grant. The reversal of that case, however, by this Court, has finally established the contrary doctrine as the true one. Counsel, however, adhere, in their brief, to the rule as it existed before the Barden case. We have already quoted the language of the Supreme Court upon this question and refrain from further citation, but we ask of this Court a careful consideration of the whole of the Barden case in connection with this record.

In their conclusion, counsel lay great stress upon and at length requote the entire Williamson letter of 1879. If the letter had correctly stated the law and the facts, this case would have had no existence, but as to this letter we ask the Court to carefully notice that it assumes as a fact the vital point in this case. It assumes a determination by

the Surveyor General which the record shows he never made. It was written in 1879, on an *ex parte* application, sixteen years after the approval of the survey, and several years after the northeast corner of this grant had been covered with prospectors diligently searching for and finding mineral lands. It was written upon the application of the then owners of this grant, without notice to any other claimants, or any investigation of the facts as to the mineral or non-mineral character of the land and three years after the mining claim in controversy here was located. It was in no sense a decision after a hearing. It is given prominence by counsel because it constitutes almost their sole reliance in this case, as being the only official statement for thirty years that these lands were, in fact, non-mineral.

Throughout their entire brief, counsel repeatedly urge that because Commissioner Edmunds on May 4, 1864, acknowledged the receipt of the approved plat and survey "without objection" and then "made no objection" to such approval, that the act of the Surveyor General became final and conclusive as the act of the government. We concur with counsel in that proposition. When the plat and survey was approved by the Surveyor General, in pursuance of the express directions of the Commissioner, and the reservation and exception of the grant perpetuated and redeclared in the approval, it left nothing for the Commissioner

upon that question, to object to, and there was no reason why he should object. The approved plat, under the declared rules, both of law and the department, was to constitute the sole evidence of title. The Commissioner had expressly directed that in the certificate of approval "the special reservation stipulated by the statute but not to embrace mineral land," should be inserted, and it had been done. The interests of the government had been protected, the grantee laying aside his desire to "cover rich minerals in the mountains," had accepted, as his sole muniment of title, an approved plat containing such express reservation of mineral land. The work of the Commissioner was not only done, but well done, and it was left for sixteen years in that condition.

Questions Submitted.

The United States Circuit Court of Appeals for the Eighth Circuit submits to this Court three questions for answer:

First—(1) Was the action of the Commissioner of the General Land Office, or of the Surveyor General of Colorado, in 1863 and 1864, evidenced by the foregoing certificates and communications, a decision by the proper officer that none of the lands in said Baca Grant No. 4 were mineral lands? and

"(2) A valid location upon the ground covered by said grant of the selection of that tract by

the heirs of Baca, under Section 6 of the 'Act to confirm certain private land claims in the territory of New Mexico,' approved June 21, 1860 (12 Statutes, 72); or

"(3) Was the action of these officers a refusal to decide that question? and

"(4) Either an attempted or actual location of the selection of said heirs, on that part only of the land described as Baca Grant No. 4, which should not, any time in the then future, be found to be mineral land?"

The defendant in error contends that this question should be answered as follows:

To clause (1), "No"; to clause (2), "Yes, reserving mineral land"; to clause 3, "Yes"; to clause (4) "Yes."

"*Second*—Was the title to that portion of the lands decribed as Baca Grant No. 4, which is in controversy in this cause, and which was mineral land, but which was not known to be mineral land until 1876, vested in the heirs of Baca and their successors in interest, by the said Act of Congress and the action of the Commissioners of the General Land Office and of the Surveyor General, evidenced by the foregoing certificates and communications?"

We maintain that this should be answered "No."

"*Third*—Was the direction of the Circuit Court to the jury, to return a verdict for the defendant in this case, right?"

We maintain that the answer to this inquiry should be "Yes."

Conclusion.

Throughout this brief, we have carefully limited ourselves to the record certified up from the United States Circuit Court of Appeals, and not referred to the more ample record from the trial Court. The certified record gives but little or no idea of the present situation with respect to this grant and the mines thereon. Counsel for plaintiffs in error, however, in their conclusion, submit some inferences, rather than statements, which ought not to go unchallenged. It is obvious that the equities of the parties, whatever they may be, do not enter into this record or into the case itself. It is purely a question of legal right. If, following counsel in the closing paragraphs of their brief, we should attempt to consider or discuss the equities which they suggest as arising in this case, we would enter upon a field the extent and nature of which is undisclosed by this record. Instead of a "level tract" of country, we would find the northeast corner actually crossing the Sangre de Cristo Mountains at an altitude of more than 13,000 feet. We would find, and the trial record shows, that for thirty years eleven and one-half miles of the north-

ern and eastern lines of this grant remained unsurveyed, unlocated and unmarked, because of the inaccessible character of the ground. We would find a grant whose actual boundaries on the ground were unknown to its owner, sixteen years after the mine in controversy in this case was located.

We would find a great number of miners and prospectors liable to be dispossessed of the holdings and the labor of years, and compelled to remove from the homes where their children have been born and reared to manhood. We would find that thriving communities, with whose ultimate prosperity the grant owners themselves are deeply concerned, would be driven out and dispossessed. But this is an action of ejectment in which the plaintiff must recover upon the strength of his own title.

He comes into court saying this is mineral land which he owns under a grant excluding mineral land, and surveyed and located by a plat and survey which in terms excluded mineral land, and produces such grant and plat as his sole title.

"The action being for the possession of lands conceded to be mineral, under the Act of Congress of July 2, 1864, it would seem that the simple reading of the granting clause and its proviso, and the joint resolution mentioned, would be a sufficient answer to the complaint."

Barden vs. Northern Pac. R., 154 U. S., 288, 312.

We therefore ask for such answers and directions to the Court below as will affirm the decision of the trial Court.

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